85-2138

No.

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1985

THE TOWNSHIP OF WOODBRIDGE,

*Petitioner,*

*vs.*

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT


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105 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether 33 U.S.C. § 1311(i)(1) establishes a direct relationship between Woodbridge Township's obligation to undertake the construction necessary to deliver its municipal sewage to the Middlesex County Utilities Authority in order to comply with the effluent limitations established by 33 U.S.C. § 1311, and the availability of financial assistance from the United States.

2. Whether the December 29, 1981 amendment to 33 U.S.C. § 1311(i)(1) automatically extended the deadline for compliance by Woodbridge Township with effluent limitations established by the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, where the Township had previously made and had granted the only request for permit modification required by 33 U.S.C. § 1311(i)(1) (as amended on December 29, 1981).

3. Whether the Court of Appeals erred in its determination that the scope of its review under 28 U.S.C. § 1292(a)(1) precluded consideration of the correctness of the District Court's entry of the December 18, 1984 injunctive order and that no evidence of changed circumstances warranting dissolution of the injunction had been adduced.

## LIST OF PARTIES

In accordance with Supreme Court Rule 21.1(b), the following is a list of the parties to the proceeding below in the United States Court of Appeals for the Third Circuit.

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY—Plaintiff; MIDDLESEX COUNTY UTILITIES AUTHORITY—Defendant-Third Party Plaintiff; STATE OF NEW JERSEY, by and through its Department of Environmental Protection, THE UNITED STATES OF AMERICA, by and through its United States Environmental Protection Agency, TOWNSHIP OF WOODBRIDGE, a municipal corporation of the State of New Jersey, THE CITY OF PERTH AMBOY, a municipal corporation of the State of New Jersey, and THE BOROUGH OF CARTERET, a municipal corporation of the State of New Jersey—Third Party Defendants.

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No.

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# Supreme Court of the United States

October Term, 1985

THE TOWNSHIP OF WOODBRIDGE,

*Petitioner,*

*vs.*

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

The Township of Woodbridge, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 28, 1986.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 787 F. 2d 117 (3rd Cir. 1986) and is printed in Appendix A hereto, *infra*, page 1a. The judgment of the United States Court of Appeals for the Third Circuit is printed in Appendix C hereto, *infra*, page 34a.

Printed in Appendix B hereto, *infra*, page 16a, are the United States District Court for the District of New Jersey's unreported opinion filed on October 24, 1984 and the accompanying order entered on October 24, 1984 granting the application of respondent United States of America for partial summary judgment as to the petitioner. Also printed in Appendix B hereto, *infra*, page 23a, is the unreported order of the District Court entered on December 18, 1984 requiring the petitioner to deliver its municipal sewage to the Middlesex County Utilities Authority, as well as the District Court's unreported opinion, filed on June 26, 1985, and accompanying order, entered on June 26, 1985, denying the petitioner's motion to dissolve the District Court's injunctive order of December 18, 1984 (Appendix B hereto, *infra*, pages 28a-33a).

## JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court, dated March 28, 1986, was entered on March 28, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involved 33 U.S.C. § 1288, 33 U.S.C. § 1311 and 33 U.S.C. § 1342, and the provisions of each of those statutes are set out in the Appendix hereto, *infra*, pages 36a-73a.

In addition, this case involved 28 U.S.C. § 1292(a)(1) which provides as follows:

> "(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory Orders of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court. . . ."

The provisions of law involved are P.L. 95-217 § 45 and P.L. 97-117 §21(a) and the appropriate provisions of each of those laws are set out in the Appendix hereto, *infra*, pages 74a-77a.

## STATEMENT OF THE CASE

This action was brought by respondent Township of Franklin Sewerage Authority in order to compel respondent Middlesex County Utilities Authority (hereinafter referred to as MCUA) to force additional New Jersey municipalities, including the Township of Woodbridge, the Borough of Carteret and the City of Perth

Amboy, to deliver their municipal sewage to the MCUA's regional treatment facility in Sayreville, New Jersey.

The MCUA named as third party defendants in this action the United States Environmental Protection Agency (hereinafter referred to as EPA or the United States), the New Jersey Department of Environmental Protection (hereinafter referred to as the DEP), the Township of Woodbridge, the Borough of Carteret and the City of Perth Amboy.

In turn, the United States filed a cross-claim against the Township of Woodbridge, alleging that the Township is in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, for failing to connect its municipal sewerage system with the MCUA facilities. Since the action against Woodbridge Township arose under federal law, the District Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

The Township of Woodbridge is a municipality in central New Jersey having a land area of approximately 23 square miles and a population of approximately 100,000 people. Woodbridge abuts two navigable waterways (*i.e.*, the Arthur Kill at a point on its northeasterly boundary and the Raritan River along its southerly boundary). At each of these general locations, Woodbridge operates a publicly owned treatment works in accordance with currently valid National Pollutant Discharge Elimination Systems (hereinafter referred to as NPDES) permits issued for those plants by the EPA.

Woodbridge Township's NPDES permits were granted on November 15, 1977, and they had an original expiration date of December 31, 1981, by which date the Township was required to comply with the sewage treatment standards set forth in 33 U.S.C. § 1311(B)(1)(b) and (C), and the permits also required Woodbridge to tie into the MCUA as soon as the transmittal

facilities were completed. Woodbridge Township timely applied for and obtained, on November 29, 1978, approval for a modification of the Township's NPDES permits, as provided for in the original enactment of 33 U.S.C. § 1311(i)(1) as Pub. L. 95-217 §45.

In 1973, with a $200,000 loan from DEP, Woodbridge had the engineering firm of Metcalf and Eddy, Inc. begin preparation of a Facility Planning Report. The preparation of the Facility Planning Report was the first phase in the process of applying for funds under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, for the construction necessary to link the Township's sewerage facilities with the MCUA. Following the Facility Planning Report, came the design phase and, after funding approval, the construction phase.

There are also three stages of the construction necessary to link Woodbridge with the MCUA. One stage entails the installation of a sewer line from the Township's Keasbey sewerage treatment plant to the Township's Hayden pumping station at an estimated cost of $16,000,000 (for which Woodbridge Township has accepted a $5,500,000 federal grant). Another stage of the linkage project is the Perth Amboy interceptor phase, which involves construction necessary to enable the City of Perth Amboy to link up with the pumping facilities of Woodbridge Township for delivery of Perth Amboy's sewage to the MCUA. The cost of both the Keasbey and the Perth Amboy interceptor phases are relatively small compared to the approximately $45,000,000 estimated cost of the third stage of the linkage project, the Sewaren interceptor phase.

The Sewaren interceptor phase requires that a sewer line transversing Woodbridge Township be constructed with large pipes (ranging to 78 inches in diameter) requiring extensive excavation of twenty-three (23) Township streets and the fording of four (4) streams with disastrous environmental consequences, as some

are destroyed and the flow of others is interrupted. In addition, the Township will be required to institute condemnation proceedings with respect to many properties in the Township, and, since no state or federal funding has been forthcoming, construction of the Sewaren interceptor phase will impose a crushing fiscal burden upon Woodbridge Township, which would be required to exceed its state-imposed debt limit by well over $5,000,000.

Although Woodbridge Township has diligently complied over the years with every requirement at each stage of the funding process provided for by the Clean Water Act for the proposed linkage of the Township with the MCUA, the federal and state authorities responsible for approving the Township's plans and permit applications have consistently acted in a dilatory manner. The dilatory conduct of those authorities, over whom Woodbridge Township has no control, is effectively illustrated by the fact that, although application for all of the environmental permits necessary for the MCUA linkage project were included in the Township's August 1982 Step III Grant Application Package filed with the DEP, the DEP did not respond to the Township with regard to those applications until the fall of 1984. Similarly, inaction by the DEP and EPA (as well as Perth Amboy and Carteret) delayed approval of the Township's facility plan by the DEP until 1980. Such dilatory conduct by governmental agencies beyond the control of Woodbridge Township, coupled with inadequate federal funding of the Clean Water Act's municipal wastewater treatment construction grants program, has drastically increased the cost of the linkage project to Woodbridge.

Moreover, the dilatory conduct of those agencies extends to their approval of plans and permit applications by Woodbridge that are essential for construction of the linkage project with or without federal funding.

Following the entry, on October 24, 1984, by the District Court of an order granting partial summary judgment to the United States on its cross-claim against Woodbridge Township, the District Court, on motion by the United States, to compel the Township to comply with the Clean Water Act and to tie into the MCUA, entered an injunctive order on December 18, 1984 requiring the Township to proceed with MCUA linkage regardless of whether federal or state funding is forthcoming and to submit a schedule for MCUA linkage within sixty (60) days. Due to the inability of Woodbridge Township to predict when the necessary plans and permit applications submitted to the state and federal environmental agencies will be acted upon, the Township submitted a tentative compliance schedule based upon the action the Township could take if the necessary approvals came through within certain periods.

On April 15, 1985, the United States moved for a judgment that the Township had failed to comply with the December 18, 1984 injunction and the Township made a cross-motion to dissolve the injunction on the grounds that, regardless of the availability of federal or state funding for the linkage project, governmental inaction at the state and federal levels on the permits and approvals necessary for construction of the project had stymied the progress of the project, and continuing governmental inaction beyond the Township's control prevented any prediction of MCUA construction necessary for the formulation of a linkage schedule. By order entered June 26, 1985, the District Court denied the Township's motion and granted the motion of the United States, assessing $16,800 in penalties against Woodbridge and directing the Township to submit a compliance schedule within a specified time. After conferring with representatives of the DEP and EPA, a mutually satisfactory compliance schedule was drafted and submitted on July 22, 1985 to the District Court and the prescribed penalties were paid by the Township.

Pursuant to 28 U.S.C. § 1292(a)(1), the Township appealed to the United States Court of Appeals for the Third Circuit the District Court's denial of the Township's application to dissolve the December 18, 1984 injunction, and, by judgment entered on March 28, 1986, the Court of Appeals affirmed the action of the District Court.

## REASONS FOR GRANTING THE WRIT

### I.

**Certiorari should be granted to settle important questions of federal law which have not been, but should be, settled by this Court.**

The questions presented by this petition relate to the issue of a municipality's obligation to proceed with construction designed to bring publicly owned wastewater treatment works into compliance with the treatment standards established by the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, without federal funding for such construction. In order to resolve that issue, this Court is called upon to settle important questions of federal law which have not been, but should be, settled by this Court, questions that turn upon the construction of 33 U.S.C. § 1311(i)(1).

It is respectfully submitted that the plain language of 33 U.S.C. § 1311(i)(1) indicates that the petitioner should not have been held liable in this action for having failed to tie into the MCUA regional treatment facility for the petitioner made and had granted the only request for modification of the NPDES permits possessed by the petitioner for its two wastewater treatment plants required by 33 U.S.C. § 1311(i)(1) (as amended on December 29, 1981). As the NPDES permits indicate, Woodbridge applied for and obtained on November 29, 1978 approval for a modification of the Township's NPDES permits in accordance

with "Section 301(i) of the Act" (*i.e.*, the original enactment of 33 U.S.C. § 1311(i)(1). That modification extended to July 1, 1983 Woodbridge Township's Clean Water Act compliance deadline. The only request for a permit modification required by 33 U.S.C. § 1311(i)(1) (as amended on December 29, 1981) is a request "within 180 days after December 27, 1977". *See* text of 33 U.S.C. § 1311(i) in Appendix D hereto, *infra*, page 52a.

Where such a modification request was made and granted under 33 U.S.C § 1311(i)(1) as it was originally enacted on December 27, 1977 as Pub. L. 95-217 § 45 (*see* Appendix D, hereto, *infra*, page 74a), the December 29, 1981 amendment to 33 U.S.C. § 1311(i)(1) automatically extended the modified deadline for compliance with the effluent limitations established by the Clean Water Act, 33 U.S.C. § 1251, *et seq.* to:

> "the earliest date by which. . .financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988".

This is indicated by the fact that the only request for permit modification provided for in the December 29, 1981 amendment to 33 U.S.C. § 1311(i)(1) is the same request "within 180 days after December 27, 1977" as that set forth in the original enactment of 33 U.S.C. § 1311(i)(1) on December 27, 1977. Of course, there could be no additional requests for permit modification under the December 29, 1981 amendment to 33 U.S.C. § 1311(i)(1) since the deadline for filing such requests was "180 days after December 27, 1977".

With the enactment of the Clean Water Act, 33 U.S.C. § 1251, *et seq.* the federal government announced a program for funding the costs to municipalities of complying with the water quality standards established by the Clean Water Act. That offer

of funding amounted to a long-range commitment to make such funds available to municipalities when and if such projects reached the approval stage.

Municipalities, such as the petitioner, that embarked on the development of elaborate water treatment plans and techniques in order to satisfy the water quality standards established by the Clean Water Act understandably did so in the belief that federal cost-sharing would be forthcoming, because such municipalities could not implement such plans and techniques without great fiscal hardship.

However, instead of receiving the federal grants promised to fund the construction necessary to bring them into compliance with the water quality standards of the Clean Water Act, municipalities such as the petitioner, which have diligently complied over the years with the requirements at each stage of the funding process provided for by the Clean Water Act, have been the victims of inadequate federal funding and of grants program delays. *See* Note, *Regulation of Noncompliant Publicly Owned Treatment Works Under the Clean Water Act*, 10 Wm. Mitchell L. Rev. 901, 906-907, 909-911 (1984).

Similarly, the legislative history of the 1981 amendment to 33 U.S.C. § 1311 reflects a promise of federal funding to aid municipalities such as the petitioner in complying with the water quality standards established by the Clean Water Act. Moreover, the legislative history of the 1981 amendment to 33 U.S.C. § 1311 indicates that, since enactment of the Clean Water Act, there has been a history, through the fault of the federal government and its designated agents (*e.g.*, the DEP) of long and unnecessary delays in the funding approval process under the Clean Water Act. These points are documented in 1981 U.S. Code Cong. and Adm. News, pages 2629-2633.

In addition, Pub. L. 97-117 § 21(a) (Appendix D, hereto, *infra*, page 77a) provides additional support for the petitioner's contention that the petitioner's obligation to proceed with MCUA linkage is contingent upon assurances of funding from the EPA and its designated agent, the DEP. Pub. L. 97-117 § 21(a) establishes a direct relationship between compliance with the water quality standards established by 33 U.S.C. § 1311 and funding under the Clean Water Act. It is respectfully submitted that, in relating the provisions of Pub. L. 97-117 § 21(a) to the case at bar, it is significant that the petitioner has diligently complied over the years with the requirements at the various stages of the funding process for federal construction grants for wastewater treatment projects, but inaction by the EPA and the DEP, and inadequate funding of the construction grants program, all totally beyond the control of the petitioner, have prevented the MCUA linkage project from going forward. Moreover, it should be noted that the progress of the MCUA project has been thwarted by the failure of reviewing agencies such as the EPA and the DEP over whom the petitioner has no authority, to take action with respect to plans and environmental permit applications for which approval is required in order for the MCUA project to proceed, with or without federal or state funding.

Furthermore, this view that 33 U.S.C. § 1311(i)(1) was designed to aid municipalities, such as Woodbridge Township, which, for reasons beyond their control, were unable to complete "planned treatment works" in time to comply with the deadlines set forth in 33 U.S.C. § 1311 is also supported by Pub. L. 95-217 § 45, the predecessor of the present 33 U.S.C. § 1311(i)(1). *See* text of Pub. L. 95-217 § 45 in Appendix D, hereto, *infra*, page 74a.

Based upon *United States v. City of Detroit*, 720 F. 2d 443, 451 (6th Cir. 1983) and *State Water Control Board v. Train*, 559 F. 2d 921, 924-927 (4th Cir. 1977), the Court of Appeals determined below that the obligation of the petitioner to comply

with the Clean Water Act is not conditioned upon the petitioner's receipt of federal funds. *See Franklin Township Sewerage Authority v. Middlesex County Utilities Authority*, 787 F. 2d 117, 122 (3rd Cir. 1986), Appendix A hereto, *infra*, page 11a.

However, it is respectfully submitted that the Court of Appeals' reliance upon these cases is misplaced, for they are readily distinguishable from the case at bar. Thus, there is no indication in the *United States v. City of Detroit, supra*, that the defendant in that case ever invoked 33 U.S.C. § 1311(i)(1) in its defense as does the petitioner in this case. Furthermore, the City of Detroit, unlike the petitioner in the case at bar, entered into a consent judgment with the United States prior to the enactment of 33 U.S.C. § 1311(i)(1) in 1977, and that consent judgment apparently barred the City of Detroit from seeking an extension of the compliance deadline under 33 U.S.C. § 1311(i)(1).

In addition, the decision of the court in *United States v. City of Detroit, supra*, at 446 and 451, cites, with virtually no discussion, *State Water Control Board v. Train*, 559 F. 2d 921 (4th Cir. 1977), as authority for holding that "the compliance and grant provisions of the FWPCA are not mutually dependent". Both the District Court and *State Water Control Board v. Train*, 424 F. Supp. 146, 155-156 (E.D. Va. 1976), and the decision by the Fourth Circuit Court of Appeals affirming the District Court decision at 559 F. 2d 921, 927-928 (4th Cir. 1977), predated the December 27, 1977 amendment of 33 U.S.C. § 1311 which added 33 U.S.C. § 1311(i)(1) to the Clean Water Act. This is significant because, as was discussed above, § 1311(i)(1) makes it clear that compliance, through the construction of necessary water treatment facilities, with the water quality standards provided for in § 1311 is related to the availability of financial assistance from the United States. As was noted above, the December 27, 1977 amendment which first added § 1311(i)(1) to the Clean Water Act extended the deadline for compliance to July 1, 1983 in appropriate cases

[*See* 61 Am. Jur. 2d, "Pollution Control", § 148 (1980)], and the December 29, 1981 amendment which established § 1311(i)(1) in its current form extended the compliance deadline to July 1, 1988 in appropriate cases. *See* Note, *Regulation of Noncompliant Publicly Owned Treatment Works Under the Clean Water Act*, 10 Wm. Mitchell L. Rev. 901, 910-911 (1984).

Both the District Court and Fourth Circuit decisions in *State Water Control Board v. Train, supra*, are based upon the fact, at the time of those decisions, there was no 33 U.S.C. § 1311(i)(1) providing an exception to the strict compliance provisions of the Clean Water Act. In fact, both the District Court and the Fourth Circuit Court of Appeals said that it was the responsibility of Congress, and not the court, to add language to the Act linking funding with compliance with the effluent limitations provided for in the Act, and, subsequent to the *Train, supra*, decisions, Congress did just that. *See* Note, *Regulation of Noncompliant Publicly Owned Treatment Works Under the Clean Water Act, supra*, fn. 58, pages 910-911.

## II.

**Certiorari should be granted because the Court of Appeals below has rendered a decision in conflict with the decisions of other federal courts of appeals on the same matters.**

It is respectfully submitted that the decision of the Court of Appeals below affirming the District Court's denial of the petitioner's motion to dissolve the injunctive order of December 18, 1984, conflicts with the decisions of other federal courts of appeals concerning the proper disposition of appeals pursuant to 28 U.S.C. § 1292(a)(1). In this case, the Court of Appeals did not consider the propriety of the entry of the injunction on appeal and affirmed the District Court's refusal to dissolve the injunction on the grounds that the petitioner had "failed to adduce any

evidence of changed circumstances that would warrant the dissolution of the December injunction". *Franklin Township Sewerage Authority v. Middlesex County Utilities Authority, supra,* at 120 and 121; Appendix D, hereto, *infra,* pages 36a-77a.

As the petitioner pointed out in the Court of Appeals, the petitioner's cross-motion to dissolve the District Court's December 18, 1984, injunction was not merely a relitigation of matters previously argued in the District Court for the contentions of the petitioner on that motion transcended the issue (*i.e.*, the focal point of the United States motion for reconsideration/summary judgment which ultimately resulted in the issuance of the December 18, 1984 injunction) of whether the petitioner should be compelled to proceed with the construction necessary to link the petitioner's sewage facilities with the facilities of the MCUA in the absence of federal or state funding for that project. Since the December 18, 1984 injunction required that the petitioner submit a schedule for linkage with the MCUA, the petitioner's motion to dissolve the injunction presented the petitioner for the first time in this litigation with an occasion to point out to the District Court that regardless of the availability of federal or state funding for the linkage project, continuing inaction by governmental authorities beyond the control of the petitioner prevented any prediction of MCUA construction necessary for formulation of a linkage schedule as required by the December 18, 1984 injunction.

The introductory paragraph of the linkage schedule ultimately agreed to by the petitioner, the EPA and the DEP following the District Court's denial of the petitioner 's motion to dissolve the December 18, 1984 injunction reflects the petitioner's complete dependence at every phase of the linkage project upon governmental authorities beyond the petitioner's control. Thus, that paragraph states:

"If Woodbridge is unable to proceed in strict

> conformance with this schedule because of circumstances beyond its control including the failure of governmental parties to process applications for permits which have been submitted in a timely and complete fashion by Woodbridge, then upon stipulation of the parties or upon good cause shown to the Court, the period of time specified by the schedule shall be extended until such time as Woodbridge is no longer prevented from proceeding because of such circumstances."

It is respectfully submitted that the petitioner made a showing below of changed circumstances warranting the dissolution of the injunctive order, and so the decision of the Court of Appeals below conflicts with the holding of *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F. 2d 786, 791 (3rd Cir. 1978).

Furthermore, contrary to the holding in *Cerro Metal Products v. Marshall*, 620 F. 2d 964, 972 (3rd Cir. 1980), the Court of Appeals below "woodenly applied" in this case the "general rule" that, on an appeal from the denial of a motion to modify or dissolve an injunction, the appellant may not challenge the merits of the underlying injunction. Adherence would produce the anomalous result in this case of foreclosing appellate review of a sparsely litigated issued (*i.e.*, the obligation of a municipality to proceed, without federal funding, with construction designed to comply with Clean Water Act standards) vitally important to municipalities throughout this country which, like the petitioner, face financial hardship, or worse, if required to proceed with construction without federal funding in order to comply with the Clean Water Act. That result would be particularly anomalous in this case since, as the Court of Appeals notes in its opinion below, *supra*, 787 F. 2d at 120; Appendix A hereto, *infra*, page 6a, the Court of Appeals denied Woodbridge Township's

petition, pursuant to 28 U.S.C. § 1292(b) for leave to appeal the summary judgment which formed the basis for entry of the December 18, 1984 injunction.

In addition, contrary to the holding of the Court of Appeals below, the scope of that court's review of the December 18, 1984 injunctive order encompasses the error of law committed by the District Court below in holding that the petitioner violated the Clean Water Act and that compliance with the Clean Water Act requires that the petitioner tie into the MCUA without federal or state funding for the linkage project. *See Cerro Metal Products v. Marshall, supra,* at 972, and *Kershner v. Mazurkiewicz,* 670 F. 2d 440, 443 (3rd Cir. 1982).

Moreover, the December 18, 1984 injunction expressly authorized "any party" to move the District Court "to resolve any issues relating to the schedule or implementation of the schedule" for MCUA linkage submitted by the petitioner. Since that order clearly indicated the District Court's willingness to re-examine any aspect of the injunction, the case at bar presents a situation analogous to that in *Fern v. Thorpe Public School,* 532 F. 2d 1120, 1130 (7th Cir. 1976), where the lower court had indicated that it would re-examine at a later date the matter of continuing an injunction, and the Court of Appeals for the Seventh Circuit determined, on an appeal from an order of the lower court refusing to vacate the injunction that it was proper on appeal to:

> "Consider whether there are sufficient infirmities in the bases of the court's granting of the preliminary injunction as to make it improper for the court to have refused to vacate the injunction."

## CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ARTHUR W. BURGESS
*Attorney for Petitioner*

JOSEPH R. BULMAN
*Of Counsel*

## APPENDIX A — OPINION OF MARCH 28, 1986 BY THIRD CIRCUIT COURT OF APPEALS

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY

v.

The STATE OF NEW JERSEY, By and Through ITS DEPARTMENT OF ENVIRONMENTAL PROTECTION, the United States of America, By and Through its United States Environmental Protection Agency, the Township of Woodbridge, a municipal corporation of the State of New Jersey, the City of Perth Amboy, a municipal corporation of the State of New Jersey, the Borough of Carteret, a municipal corporation of the State of New Jersey.

Appeal of The TOWNSHIP OF WOODBRIDGE.

NO. 85-5493.

United States Court of Appeals, Third Circuit

Argued March 4, 1986.

Decided March 28, 1986.

Appeal was taken from interlocutory order of the United States District Court, District of New Jersey, Anne E. Thompson, J., dismissing township's motion to dissolve injunction and imposing civil sanctions for township's alleged violations of Clean Water Act. The Court of Appeals, Gibbons, Circuit Judge, held

that: (1) Court of Appeals' review of order denying motion to dissolve injunction was confined to propriety of denial of motion and did not extend to propriety of entry of underlying injunction; (2) denial of township's motion was not abuse of discretion; (3) township's obligation to comply with Clean Water Act was not conditioned upon township's receipt of federal funds; and (4) amendments to Clean Water Act, which extended time which publicly owned water treatment works had to comply with Act, did not apply to township.

Affirmed.

F. Henry Habicht, II, Asst. Atty. Gen., Dirk D. Snel, Bruce J. Berger, John T. Stahr (argued), Attys., Dept. of Justice, Washington, D.C., for U.S.; George A. Shanahan, U.S., E.P.A.—Region II, New York City, of counsel.

Joseph R. Bulman (argued), on brief (Arthur W. Burgess, Director of Law, of counsel), Woodbridge, N.J., for Woodbridge Tp.

Before GIBBONS, BECKER and ROSENN, Circuit Judges.

## OPINION OF THE COURT

GIBBONS, Circuit Judge:

The Township of Woodbridge appeals from an interlocutory order entered by the district court denying its motion to dissolve an injunction and granting the United States' motion for the assessment of civil sanctions. Woodbridge argues that the district court should have granted its motion to dissolve the injunction because it was not in violation of any federal law. The government

contends that we should dismiss the appeal for lack of jurisdiction, and, alternatively, that the district court's refusal to dissolve the injunction was proper because Woodbridge violates sections 301(a) and 301(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1311(a) and (b)(1)(B) (1982). We affirm.

I.

This appeal arises out of a cross-claim filed by the United States in a suit originally brought by the Township of Franklin Sewerage Authority against the Middlesex County Utilities Authority (MCUA), a regional waste treatment facility and sewage disposal system. Franklin delivers its sewage to MCUA and is charged on a pro rata basis. It sued MCUA to compel three other municipalites, Woodbridge, the Borough of Carteret and the City of Perth Amboy, to link their sewage systems with MCUA and to share in the cost of MCUA's operations. MCUA, in turn, filed a third-party complaint against Woodbridge, Carteret, Perth Amboy, the New Jersey Department of Environmental Protection (NJDEP), and the United States, through the United States Environmental Protection Agency (EPA). The United States then filed cross-claims against Woodbridge, Carteret, and Perth Amboy, seeking to enjoin those parties from discharging pollutants into navigable waters in violation of sections 301(a) and 301(b)(1)(B) of the Clean Water Act. The United States also sought an order compelling them to link their sewage systems to the MCUA system pursuant to section 208 of the Clean Water Act, 33 U.S.C. § 1288 (1982), prescribing the development of areawide waste treatment management systems. The liability of both Carteret and Perth Amboy was resolved in favor of the United States upon the district court's entry of summary judgment against Carteret and its entry of a consent judgment against Perth Amboy. Both judgments required the municipalities to tie in with MCUA.

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This appeal involves Woodbridge's liability on the United States' cross-claim.

Woodbridge owns and operates two wastewater treatment works, the Keasbey Sewage Treatment Plant (Keasbey) and the Sewaren Sewage Treatment Plant (Sewaren). Both consist of a primary treatment plant and a wastewater collection system. The collection systems channel sewage, industrial waste, and storm runoff into the primary plants for treatment. After treatment is completed, Keasbey discharges into Kinsey Creek and Sewaren discharges into Arthur Kill, both navigable waters.

In 1975, the Governor of New Jersey, pursuant to section 208 of the Clean Water Act, appointed a board consisting of numerous public officials to develop a regional wastewater treatment plan for Middlesex County. The plan was completed in 1977, was certified by the Governor in 1978; and was approved by the EPA in 1979. The plan calls for the abandonment of existing municipal treatment facilities and the channeling of their sewage flows to MCUA.

In 1977, EPA issued Woodbridge National Pollutant Discharge Elimination System (NPDES) permits for Keasbey and Sewaren, allowing Woodbridge to continue utilizing these two facilities even thought the quality of their discharges did not satisfy the effluent standards set by the Clean Water Act. *See* 33 U.S.C. § 1311(b)(1)(B). These permits were effective from December 31, 1977 until December 31, 1981. The permits, however, required Woodbridge to tie in with MCUA as soon as the construction of the transmittal facilities was completed. In 1978, Woodbridge obtained modifications of its NPDES permits. The modifications essentially granted Woodbridge an extension of time in which to use the Keasbey and Sewaren plants and in which to tie in to

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MCUA, provided that Woodbridge complied with a planning schedule developed by EPA for transporting sewage flows to MCUA.

In 1977 EPA awarded Woodbridge a planning grant of nearly $1,000,000 to develop the transmittal facilities. In 1980, EPA awarded Woodbridge a $1,600,000 design grant for the MCUA tie-in. In 1984, EPA awarded Woodbridge a $5,500,000 construction grant for the Keasbey tie-in segment.

On March 9, 1984 the United States filed a motion for summary judgment on liability on its cross-claim against Woodbridge. Following briefing and oral argument, the district court denied the United States' motion, finding that it was possible that as a matter of law Woodbridge, through its Keasbey and Sewaren plants, was discharging sewage pursuant to valid NPDES permits.

The United States moved for reconsideration, stating that it did not contest the validity of the permits. Rather, it contended that Woodbridge's actions were in violation of the terms of otherwise valid permits. On October 24, 1984 the court granted the United States' motion for reconsideration and entered partial summary judgment in its favor, holding that Woodbridge was violating section 301 of the Clean Water Act by discharging pollutants into navigable waters, by failing to provide adequate secondary treatment at its two sewage plants to meet the requisite effluent limitations, and by failing to tie into the MCUA regional treatment facility. The court ordered the parties to submit to it within forty-five days plans for bringing Woodbridge in compliance with the Act.

On November 21, 1984, Woodbridge appealed the entry of

partial summary judgment. The United States moved to dismiss the appeal for lack of jurisdiction. On February 12, 1985 we dismissed Woodbridge's interlocutory appeal without prejudice.

In the interim, on December 11, 1984, the United States filed a motion with the district court to compel Woodbridge to comply with the Clean Water Act and to tie in with MCUA. On December 18, 1984, the district court entered an injunction directing Woodbridge to develop a compliance schedule within sixty days and to achieve actual compliance within a specified time. In addition, the order provided that civil penalties would be assessed against Woodbridge if it failed to comply. This order was not appealed. Instead, Woodbridge requested the district court to certify for appeal pursuant to 28 U.S.C. § 1292(b) the court's October 24, 1984 order granting partial summary judgment in favor of the United States, and to stay the proceedings pending appeal. The district court granted Woodbridge's motion for certification, but denied its motion for a stay. This court on April 12, 1985 denied Woodbridge's petition for leave to appeal.

On April 15, 1985 the United States filed a motion for a judgment that Woodbridge had failed to comply with the terms of the injunction and for the imposition of sanctions for its failure to comply. On May 6, 1985, almost five months after the district court entered the injunction, Woodbridge moved for the district court to dissolve it. The district court denied Woodbridge's motion, but granted the United States' motion for sanctions, assessing $16,800.00 in penalties against Woodbridge. The court also directed Woodbridge to submit a compliance schedule within a specified time.

In rejecting the arguments raised in Woodbridge's motion to dissolve the injunction, the court stated that it already had

addressed and rejected the same arguments on two prior occasions, first when it entered summary judgment against Woodbridge, and second when it entered the December injunction against Woodbridge. Because Woodbridge failed to offer any new authority or analysis supporting a contrary result, the court held that Woodbridge's motion was without merit.

The compliance schedule was finally filed on July 22, 1985. It met with the acceptance of both the NJDEP and the EPA. Woodbridge then filed this appeal and sought a stay of the remainder of the district court's order in this court. We denied the stay on August 15, 1985.

II.

The primary issue before us is what issues may be raised in an appeal from the denial of a motion to dissolve an injunction. The United States contends that unless the appellant alleges that changed circumstances warrant overturning the injunction, the court of appeals lacks jurisdiction. Because the denial of a motion to dissolve an injunction comes within the language of section 1292(a)(1) of title 28 of the United States Code, which explicitly confers jurisdiction over such interlocutory orders, the United States' position is without merit. *See* 28 U.S.C. § 1292(a)(1) (1982). There can be no question that this court has jurisdiction over Woodbridge's interlocutory appeal. *See Professional Plan Examiners of New Jersey, Inc. v. LeFante*, 750 F.2d 282, 287 (3d Cir. 1984); *International Brotherhood of Teamsters, Local 249 v. Western Pennsylvania Motor Carriers Association*, 660 F.2d 76, 80-81 (3d Cir. 1981); *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F.2d 786, 791 (3d Cir. 1978).

The crucial question thus is not appellate jurisdiction, but

scope of review. The prevailing law is that appellate review of an order denying a motion to dissolve an injunction is confined to the propriety of the denial of the motion; it does not extend to the propriety of the entry of the underlying injunction. *See, e.g., Merrell-National,* 579 F.2d at 791; *LeFante,* 750 F.2d at 287; *Cerro Metal Products v. Marshall,* 620 F.2d 964, 972, 972 n. 18 (3d Cir. 1980); *Winterland Concessions Co. v. Trela,* 735 F.2d 257, 260 (7th Cir. 1984); *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3924 (1977 & Supp. 1985). The rationale behind this rule is that the appellant should not be allowed "to use the appealability of an order denying modification [or dissolution] of an injunction to circumvent the time bar to appeal from the underlying injunction." *Merrell-National,* 579 F.2d at 791.

Since our review is limited to considering the correctness of the district court's denial of the motion to dissolve the injunction, we can reverse the decision of the district court only if we find that the district court has abused its discretion. *See Merrell-National,* 579 F.2d at 791-92. The standard that the district court must apply when considering a motion to dissolve an injunction is whether the movant has made a showing that changed circumstances warrant the discontinuation of the order. *See LeFante,* 750 F.2d at 287; *Merrell-National,* 579 F.2d at 791.

In this case, Woodbridge failed to adduce any evidence of changed circumstances that would warrant the dissolution of the December injunction. Before the district court, Woodbridge argued that its liability under the Clean Water Act was contingent upon its receipt of federal funds, and that the 1981 amendments to the Act extended the grace period for non-compliance until 1988. Reviewing these contentions, the district court found that Woodbridge was simply repeating arguments that it had raised

on one if not two prior occasions and that had been explicitly rejected by the district court on each occasion. Therefore, the district court concluded that "Woodbridge's motion [was] without merit and border[ed] on the abusive." J.A. 666.

The district court correctly applied the changed circumstances standard. From the record it appears that Woodbridge clearly had raised the funding argument and the amendment argument before, and that each time they were resoundingly rejected by the district court. Woodbridge could have presented these arguments to us on an appeal from the district court's entry of the December injunction. Woodbridge, however, neglected to take an appeal from that order. Now that the time for appeal has run, Woodbridge may not avoid the consequences of its failure to appeal timely by cloaking its late appeal in the guise of a motion to dissolve the injunction. Absent the assertion of changed circumstances, the appellant is not entitled to the vacation of an unappealed injunction. Because Woodbridge did not assert any changed circumstances, the district court did not abuse its discretion in denying its motion to dissolve the December injunction.

III.

Because our scope of review is limited to determining whether the district court abused its discretion in denying Woodbridge's motion to dissolve the December injunction, we cannot reach the issue of the correctness of the district court's entry of the December injunction. Assuming, *arguendo*, however, that we were to reach this issue, we nonetheless would affirm the district court.

Woodbridge contests the propriety of the entry of the December injunction, arguing that its failure to tie in to the MCUA

system is not a violation of section 301 of the Clean Water Act because subsection (i) of that section provides that a municipality's obligations are contingent upon its receipt of federal financial assistance. In the alternative, Woodbridge claims that the entry of the injunction was improper because it is discharging pollutants pursuant to valid NPDES permits.

The language and legislative history of section 301(i) of the Clean Water Act require the inescapable conclusion that a municipality's obligation under that section is not contingent upon its receipt of federal financial assistance. Section 301(i) states that

> [w]here construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under . . . [certain subsections of] this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator . . . to issue a permit pursuant to section 1342 of this title or to modify a permit issued prusuant to that section to extend such time for compliance.

33 U.S.C. § 1311(i)(1).

In this section Congress made clear that the existence of either of the two specified conditions only activates the Administrator's *discretion* to award or to modify a permit. *See* Municipal Wastewater Treatment Construction Grant Amendments of 1981,

Pub.L. No. 97-117, § 21(a), 95 Stat. 1623, 1631. Nowhere did Congress provide that the existence of either of these conditions automatically suspends or requires the Administrator to suspend an operator's obligations under the Act. Moreover, even if these conditions exist and the Administrator has the discretion to grant a permit or modification, the owner or operator must still ask for one. *See* 33 U.S.C. § 1311(i). Thus, from the plain language of the statute it is clear that the obligation of an operator such as Woodbridge to comply with the Clean Water Act is not conditioned upon the operator's receipt of federal funds. This reading accords with that of the other courts that have considered the same issue. *See United States v. City of Detroit*, 720 F.2d 443, 451 (6th Cir. 1983); *State Water Control Board v. Train*, 559 F.2d 921, 924-27 (4th Cir. 1977). Thus if the question were properly before us, we would hold that funding is not a prerequisite to compliance with the Act.

Woodbridge's second argument is that it is not in violation of the Act because it is discharging pollutants pursuant to valid NPDES permits. The controversy over the validity of the permits centers around their date of expiration. The United States asserts that the language of the Clean Water Act and the permits themselves provide that they expired on July 1, 1983. Woodbridge contends that by operation of the 1981 amendments to the Clean Water Act, the permits, which were originally to expire on July 1, 1983, were automatically extended to July 1, 1988.

Section 301(a) of the Act provides that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 301(b)(1)(B) of the Act, which was first enacted in 1972 as part of the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500,

§ 301(b)(1)(B), 86 Stat. 816, requires publicly owned treatment works to achieve compliance with certain effluent limitations by July 1, 1977. 33 U.S.C. § 1311(b)(1)(B). Section 402 of the Act, which also was enacted as part of the FWPCAA, provides, however, that public treatment works can apply for NPDES permits to allow them to continue discharging pollutants so long as they comply with the conditions imposed by the EPA Administrator to achieve compliance sometime in the future. 33 U.S.C. § 1342 (1982). Under section 208 of the Act, permits issued under section 402 cannot conflict with the requirements of any regional wastewater treatment plan. 33 U.S.C. § 1288(e) (1982).

In October of 1977, the regional plan encompassing Woodbridge was complete. On November 15, 1977, Woodbridge applied for two NPDES permits. As a condition for obtaining the permits, the EPA Administrator required Woodbridge to convey its sewage flows to MCUA as soon as the transmittal facilities were operable. J.A. at 685, 702. These permits, by their own terms were due to expire on December 31, 1981.

On December 27, 1977 Congress amended the FWPCAA by enacting the Clean Water Act of 1977, Pub.L. No. 95-217, 91 Stat. 1566. Although retaining the requirement in section 301(b)(1)(B) that publicly owned treatment works comply with certain effluent limitations, Congress added subsection (i), entitled "Municipal Time Extensions", which allows the owners of such works to apply for NPDES permits or modifications of their existing NPDES permits to enable them to discharge pollutants beyond the July 1, 1977 deadline. *See* Pub.L. 95-217, § 45, 91 Stat. at 1584-85, codified at 33 U.S.C. § 1311(i) (1982). The statute provides, however, that in no event can extensions be granted beyond July 1, 1983. *Id.*

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To obtain an NPDES permit or a modification of an NPDES permit under the statute, the owner must show that it cannot meet the compliance standards because the necessary construction can not be completed in time, or the necessary federal funding has not been made available and that it has been acting in good faith. *See id.;* S.Rep. No. 95-370, 95th Cong., 1st Ses. 46-50, U.S. Code Cong. & Admin. News pp. 4326, 4370-4375 (1977). In addition, the statute provides that requests for either a permit or a modification must be filed with the Administrator within 180 days of December 27, 1977. 33 U.S.C. § 1311(i).

After discovering that it was not meeting the effluent limitations imposed by the Act, Woodbridge, presumably within the 180-day period specified in section 301(i), applied for a modification of its November 1977 NPDES permits. The modification was granted on November 29, 1978. The modification gave Woodbridge an extension until July 1, 1983. The permits reiterated the requirement that Woodbridge tie in with MCUA, and they set forth a compliance schedule to encourage Woodbridge to take certain steps towards this end within specified time periods. The outside date for completion under the terms of both the permits and the statute remained July 1, 1983.

On December 29, 1981 Congress amended the Clean Water Act, primarily to eliminate federal funding for certain categories of waste treatment facilities. *See* Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub.L. No. 97-117, 95 Stat. 1623, 1631. In addition, however, section 21(a) of the Amendments changed the ultimate deadline for compliance in section 301(i) of the Act from July 1, 1983 to July 1, 1988. The rest of section 301(i) remained unchanged, including the requirement that any requests for NPDES permits or for extensions of such permits be filed within 180 days of December 27, 1977.

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In enacting section 21(a) Congress explained that the amendment extending the deadline to July 1, 1988 was not to be construed

> to extend the date of compliance . . . [with the effluent limitations] beyond schedules for compliance in effect as of the date of the enactment of this Act, *except* in cases where reductions in the amount of financial assistance under this Act or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.

*Id.* The legislative history of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 provides no further explanation of the meaning or the effect of the amendment establishing the new July 1, 1988 deadline.

Woodbridge contends that the enactment of section 21(a) automatically extended its permits to July 1, 1988 because its compliance was held up by the federal government's failure to allocate sufficient funds for the linkage project. Examining the language of section 21(a), however, it appears that it sanctions extensions only for two categories of municipal works—those whose funding was reduced *pursuant* to the 1981 amendments, and those for whom changed conditions beyond their control have made compliance impossible. Nothing in the record establishes that Woodbridge satisfies either of these conditions. Therefore, we reject Woodbridge's contention that the 1981 amendments extended its permits until July 1, 1988.

Because Woodbridge continued to discharge pollutants

beyond the July 1, 1983 expiration date of its permits, we would, if its appeal were timely, hold that Woodbridge violated section 301 of the Clean Water Act, and that the district court's entry of the injunction was, therefore, proper.

IV.

The order denying Woodbridge's motion to dissolve the December 18, 1984 injunction will be affirmed. Because Woodbridge made no showing of changed circumstances, its motion was completely without merit, and this appeal is frivolous. The United States shall be awarded double costs. Fed.R.App.P. 38.

**APPENDIX B—OPINION OF HONORABLE ANNE E. THOMPSON, U.S.D.J. (DATED OCTOBER 23, 1984 AND FILED ON OCTOBER 24, 1984) ACCOMPANYING OCTOBER 23, 1984 ORDER GRANTING APPLICATION OF THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA FOR PARTIAL SUMMARY JUDGMENT AS TO THIRD-PARTY DEFENDANT TOWNSHIP OF WOODBRIDGE**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 80-4041

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY,

Plaintiff

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, et al.,

Defendants

FILED ON OCTOBER 24, 1984

OPINION

THOMPSON, District Judge

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This matter comes before the court on motions of third-party defendant United States for reconsideration of this court's order of August 3, 1984 denying partial summary judgment as to the liability of the Township of Woodbridge, and for leave to file this motion out of time. The motion for leave to file is granted as unopposed.

This complex action can be described as one in which the Township of Franklin and the Middlesex County Utilities Authority ["MUCA"] are attempting to compel a number of municipalities to comply with a regional wastewater treatment plan by connecting with the MCUA facilities. The United States' motion reconsidered here sought to dispose of a discrete portion

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of the lawsuit. The United States sought a judgment that the Township of Woodbridge was in violation of the Clean Water Act ["Act"], 33 U.S.C. § 1251 *et seq.*

The Act prohibits the discharge of pollutants into any navigable waterway in any manner not specifically permitted by the Act. § 1311(a). The Act authorizes the Environmental Protection Agency ["EPA"] to issue permits conditionally allowing certain discharges. § 1342. The Act embodies an adoption of certain timetables for the reduction or elimination of water pollution. One of the benchmarks by which compliance with the Act is measured is the achievement of "secondary treatment." § 1314(d)(1). The Act required municipal water treatment works to be in compliance with secondary treatment standards determined by the EPA by July 1, 1977. However, municipalities were allowed to apply for time extensions under certain circumstances. The Act initially allowed the EPA to grant extensions up to July 1, 1983. In 1981, the Act was amended to allow the EPA to grant time extensions to July 1, 1988, at the discretion of the EPA administrator. § 1311(i)(1).

At the time of the hearing on the motion for partial summary judgment, certain facts were undisputed. The EPA had issued permits in 1977 for Woodbridge's water treatment plants. In 1978, the EPA granted an extension of time to July 1, 1983, for Woodbridge to achieve secondary treatment. The permits are clearly conditioned upon Woodbridge's cooperation with the regional water treatment plan, pursuant to the requirements of § 1288. This plan requires that Woodbridge "tie-in" with MCUA. As of July 1, 1983, and as of the day of that hearing, Woodbridge had not achieved secondary treatment. The United States argued at that time that, because the Act imposes strict civil liability on entities discharging pollutants and not meeting secondary treatment

standards unless that entity is authorized to do so by the EPA, summary judgment should be granted.

Summary judgment was denied because there appeared to be unresolved factual issues related to the permits. Specifically, there were issues of fact regarding the validity of the permits, and the availability to Woodbridge of further extensions of time to achieve secondary treatment.

It is now clear that there is no issue of fact as to the validity of the permits—no party argues that the permits are invalid. Further, it is now clear that Woodbridge has not been granted an extension of time to achieve secondary treatment levels in its water treatment facilities. Summary judgment as to third-party defendant Township of Woodbridge's liability under the Clean Water Act will therefore be granted.

The court requests that the parties discuss the most suitable plan for bringing the Township of Woodbridge into compliance with the Act. The parties will jointly submit, within 45 days of the order accompanying this decision, a form of order appropriate to that end.

October 23, 1984

**APPENDIX B—ORDER OF HONORABLE ANNE E. THOMPSON, U.S.D.J. GRANTING APPLICATION OF THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA FOR PARTIAL SUMMARY JUDGMENT AS TO TOWNSHIP OF WOODBRIDGE, DATED OCTOBER 23, 1984 AND ENTERED ON OCTOBER 24, 1984**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 80-4041

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY,

Plaintiff

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, et al.,

Defendants

ENTERED ON OCTOBER 24, 1984
ORDER

The United States having filed a motion for reconsideration of this court's August 3, 1984 order denying the United States' motion for partial summary judgment against the Township of Woodbridge on issues of liability and the court having considered the moving papers and arguments of counsel and for the reasons stated in the court's opinion filed even date herewith, it is on this 23rd day of October 1984,

ORDERED that the motion for reconsideration and the motion for partial summary judgment be and the same are hereby granted and it is further

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**ORDERED that the parties jointly submit, within 45 days of this order, a form of order setting forth terms by which the Township of Woodbridge will achieve compliance with the Clean Water Act.**

**s/ Anne E. Thompson**
**ANNE E. THOMPSON, U.S.D.J.**

## APPENDIX B—ORDER OF HONORABLE ANNE E. THOMPSON, U.S.D.J. (DATED DECEMBER 10, 1984 AND ENTERED ON DECEMBER 18, 1984) REQUIRING THE TOWNSHIP OF WOODBRIDGE TO COMPLY WITH THE CLEAN WATER ACT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-4041

Honorable Anne E. Thompson

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY,

Plaintiff,

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY,

Defendant-Third-Party-Plaintiff,

v.

THE STATE OF NEW JERSEY, ET AL.,

Third-Party Defendants.

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ENTERED ON DECEMBER 18, 1984

ORDER REQUIRING TOWNSHIP OF WOODBRIDGE TO COMPLY WITH CLEAN WATER ACT

In its Order dated October 24, 1984, this Court granted the Motion for Reconsideration submitted by the Third-Party-

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Defendant Cross-Claimant United States of America, relating to its Motion for Summary Judgment Against the Township of Woodbridge ("Woodbridge") on Issues of Liability. Woodbridge has been and is discharging pollutants from its Keasbey and Sewaren treatment plants into navigable waters. Woodbridge has been found to have violated and to be violating the Clean Water Act, by failing to achieve secondary treatment at those plants as required by Section 301(b)(1)(B) of the Act, 33 U.S.C. § 1311(b)(1), and its National Pollutant Discharge Elimination System ("NPDES") permits, and by failing to tie into the Middlesex County Utilities Authority ("MCUA") regional treatment facility as required by its NPDES permits and the Areawide Waste Treatment Management Plan developed pursuant to Section 208 of the Act, 33 U.S.C. § 1288.

ORDER

The Court hereby ORDERS as follows:

1. Within 60 days of entry of this Order, the Township of Woodbridge shall enter into service agreements with all parties to this action that will be connected to or receive flow from Woodbridge's portion of the sewerage system, and copies of such service agreements shall be filed with the Court and with all parties to this action;

2. Within 60 days of the entry of this Order, the Township of Woodbridge shall, in addition, file with this Court and all parties hereto a proposed compliance schedule for the tie-in to MCUA, beginning immediately and to be completed as expeditiously as possible. Such schedule shall set forth in detail the steps by which Woodbridge will tie in with MCUA and shall set forth the beginning, completion, and other significant interim dates of each

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engineering study, solicitation for bids, bid review, financing, and construction period necessary for compliance. Such schedule shall in no event provide for less expeditious construction and completion than as follows:

(a) Construction of the Interceptor Sewer from the Keasbey Sewage Treatment Plant to the MCUA Trunk Sewer ("Keasbey Interceptor") shall begin no later than June 30, 1985 and shall be completed no later than December 31, 1986.

(b) Construction to extend the Interceptor Sewer from the Keasbey Interceptor to the point of connection to the proposed City of Perth Amboy Interceptor shall begin no later than October 1, 1985 and shall be completed no later than April 1, 1987.

(c) Construction of all Pump Stations and Force Mains, and the Interceptor from the Sewaren Sewage Treatment Plant to connect to facilities referenced in subparagraphs (a) and (b) above ("Sewaren Project") shall begin no later than January 31, 1986 and shall be completed no later than June 1, 1988.

(d) Transmission of all sewage flows from the Keasbey Interceptor to MCUA shall begin no later than December 31, 1986, and shall continue thereafater, and transmission of all sewage flows from the Sewaren Project to MCUA shall begin no later than June 30, 1988, and shall continue thereafter; except that, in either case, if the

necessary construction is completed prior to the dates specified herein, transmission of all applicable sewage flows shall begin no later than one month following such earlier date or dates and shall continue thereafter.

3. Within 45 days of receipt of Woodbridge's proposed compliance schedule, all other parties shall file any objection that they may have relating to such schedule. Thereafter, upon motion filed by any party, this Court will schedule a hearing on the compliance schedule to resolve any issues relating to the schedule and implementation of the schedule. If no objections are filed, or if objections are resolved by stipulation or by order of the Court, the provisions of such unopposed schedule, stipulation or order will be treated as if set forth herein and will be enforceable by the Court through the provisions of Paragraph 5 below or through contempt proceedings.

4. Woodbridge's responsibility to comply with the Clean Water Act, its NPDES permits, and this Order is not contingent upon the receipt of any federal or state loan or grant. Nevertheless, any such grant or loan offered after the entry of this Order shall be unconditionally accepted by Woodbridge within 21 days of the time of offer.

5. In the event that Woodbridge shall fail to comply with any of the provisions of Paragraphs 1, 2, 3, or 4 of this Order, stipulated civil penalties of $1000 per day of failure shall be assessed against Woodbridge.

6. Issues relating to the civil penalties to be assessed against the Township of Woodbridge pursuant to Section 309 of the Clean Water Act, 33 U.S.C. § 1319, if any, for past violations of the

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**Act, shall be determined at a later date at a hearing to be scheduled by the Court.**

**s/ Anne E. Thompson**
**ANNE E. THOMPSON**
**Judge, United States District Court**

**December 10, 1984**
**DATE**

## APPENDIX B—ORDER OF JUNE 25, 1985 OF THE HONORABLE ANNE E. THOMPSON, U.S.D.J. DENYING WOODBRIDGE TOWNSHIP'S MOTION TO DISSOLVE INJUNCTION AND ORDERING PAYMENT OF CIVIL PENALTIES

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 80-4041

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY,

Plaintiff

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, et al.,

Defendants

---

ENTERED ON JUNE 26, 1986
ORDER

This matter having come before the court on the motion of third-party defendant Township of Woodbridge to dissolve this court's order of December 18, 1984, and on the motion of third-party United States for the imposition of sanctions for the failure of the Township of Woodbridge to comply with the order of December 18, 1984, and the court having considered the argument of counsel and the moving and opposing papers, and for good cause shown, and for the reasons stated in the opinion of the court filed even date herewith;

It is on this 25th day of June 1985,

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**ORDERED that the motion of the Township of Woodbridge be and hereby is denied; and it is further**

**ORDERED that the Township of Woodbridge pay civil penalties pursuant to this court's order of December 18, 1984, in the amount of $16,800 to the Clerk of the Court within 30 days of this order; and it is further**

**ORDERED that the Township of Woodbridge submit a compliance schedule pursuant to this court's order of December 18, 1984, by July 10, 1985; and it is further**

**ORDERED that the Township of Woodbridge show cause on July 15, 1985, why it should not be held in contempt.**

**s/ Anne E. Thompson**

**ANNE E. THOMPSON, U.S.D.J.**

## APPENDIX B—OPINION OF JUNE 25, 1985 OF THE HONORABLE ANNE E. THOMPSON, U.S.D.J. DENYING WOODBRIDGE TOWNSHIP'S MOTION TO DISSOLVE INJUNCTION AND ORDERING PAYMENT OF CIVIL PENALTIES

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 80-4041

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY,

Plaintiff

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, et al.,

Defendants

---

FILED ON JUNE 26, 1986
OPINION

THOMPSON, District Judge

This matter comes before the court on two motions relating to the enforcement of a previous order of this court. On October 24, 1984, we granted the motion of the United States for partial summary judgment as to the Township of Woodbridge's liability under the Clean Water Act, 33 U.S.C.§ 1251, *et seq.* on December 18, 1984, we entered an order requiring Woodbridge to comply with the Act. The order required that Woodbridge, by March 4, 1985, file with the court

> a proposed compliance schedule for the tie-in to MCUA, beginning immediately and to be completed as expeditiously as possible. Such a schedule shall set forth in detail the steps by which Woodbridge will tie in with MCUA and shall set forth the beginning, completion, and other significant interim dates of each engineering study, solicitation for bids, bid review, financing, and construction period necessary for compliance.

The order goes on to detail certain deadlines which must be contemplated in any such schedule. The order recites that Woodbridge's compliance is not dependent on its receipt of any state or federal funding, and provides for civil penalties of $1,000 per day for failure to comply with the order.

Today Woodbridge moves for the dissolution of the December 18 order, and the United States moves for the imposition of sanctions for Woodbridge's failure to comply with that order.

We will deny Woodbridge's motion. We have addressed the issue presented—whether the obligation to comply with the Act is contingent upon the receipt of funding from the United States—on two previous occasions. Woodbridge offers no new analysis or authority which would lead the court to modify its holdings on this issue. The specific argument advanced, that the 1981 amendment to 33 U.S.C. § 1311 allows Woodbridge to avoid liability, has been explicitly rejected by the court. We find that Woodbridge's motion is without merit and borders on the abusive.

The United States' motion is precipitated by Woodbridge's failure to comply with the order. In response to the direction of the court that it supply a detailed schedule of compliance,

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Woodbridge provides a report of Angelo Valetutto, the Township's municipal engineer. This report in essence opines that such a schedule could be forthcoming. The report itself does not attempt to comply with the order by supplying "in detail the steps by which Woodbridge will tie in with MCUA." The affidavit of Mr. Valtutto filed in opposition to the motion of the United States does not remedy Woodbridge's failure. This affidavit certainly supplies greater detail regarding Woodbridge's failure to comply with the order.

Mr. Valtutto's affidavit, and the argument of counsel for Woodbridge at oral argument, failed to address salient points raised in the affidavit of Richard Salkie submitted in objection to the proposed compliance schedule. For example, Salkie states that the compliance schedule fails to address the Township's failure to properly complete its application for permits for the Sewaren project, although it has been notified by the Department of Environmental Protection that additional submissions are required. Salkie Affidavit, ¶¶ 13-19. In his affidavit in opposition to the motion of the United States, Valtutto states that,

> [a]lthough both the Township and its consulting engineers, Metcalf & Eddy, Inc. were aware that such an addendum to the facilities plan would have to be submitted to the DEP, the Township realized that such an addendum did not require the Township's immediate attention, since funding consideration by the DEP and EPA for the Sewaren phase of the project was sometime off.

Valetutto Affidavit in Opposition to the Motion of the United States, ¶ 21, Given this court's finding that Woodbridge has an obligation to complete the MCUA project whether it receives

funding from the EPA or the DEP, this statement of Valetutto is not responsive to the objection of the United States. We must find that Woodbridge failed to comply with the order, and that it as not yet, as of 3½ months after the deadline imposed by the order, filed a proper compliance schedule.

The EPA and the DEP have offered to assist Woodbridge in untangling the bureaucratic problems connected with this undertaking. Counsel agreed at oral argument that some meetings have taken place. We fear that Woodbridge' reluctance, evidenced by its motion denied today, to accept this court's ruling that it may not evade its responsibilities under the Act on the basis of any lack of federal funding has colored the meetings that have taken place. We reiterate our finding that Woodbridge's position in this regard is without a basis in the law.

We will require that a complying schedule be filed with the court no later than July 10, 1985. We will set down for July 15, 1985 a hearing for an order to show cause why Woodbridge should not be held in contempt of this court. We recommend that Woodbridge accept the offers of the United States and the State of New Jersey to meet to discuss such a schedule. Should the parties agree to a schedule, the court will consider it prior to July 15 and, if it is acceptable to the court, the hearing will not be required.

As to penalties, we find that Woodbridge's failure to comply has extended from March 4, 1985 to the present, for a total of 112 days. The stipulated penalty is $1,000 per day; we order that Woodbridge pay to the Clerk of the Court the amount of $16,800, representing a penalty of $150 per day, within 30 days of this order.

## APPENDIX C—JUDGMENT OF THIRD CIRCUIT COURT OF APPEALS ENTERED ON MARCH 28, 1986

FOR THE THIRD CIRCUIT
ENTERED ON MARCH 28, 1986
No. 85-5493

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY, a body corporate and politic

vs.

MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly the Middlesex County Sewerage Authority), a body corporate and politic, Deft. 3rd Party Plaintiff

vs.

THE STATE OF NEW JERSEY, by and through its DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE UNITED STATES OF AMERICA, by and throught its UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE TOWNSHIP OF WOODBRIDGE, a municipal corporation of the State of New Jersey, THE CITY OF PERTH AMBOY, a municipal corporation of the State of New Jersey, and the BOROUGH OF CARTERET, a municipal corporation of the State of New Jersey—The Township of Woodbridge, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 80-4041)

Present: GIBBONS, BECKER and ROSENN, *Circuit Judges*

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## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 4, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 26, 1985, be, and the same is hereby affirmed. It is further ordered and adjudged that the United States is awarded double costs pursuant to Rule 38, Fed. R.App.P., because this appeal is frivolous. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Sally Mrvos
Clerk

March 28, 1986

Costs taxed in favor of appellee as follows:

| | |
|---|---|
| Double costs awarded pursuant to Rule 38 F.R.A.P. | $92.65 |
| | × 2 |
| Total ..... | $185.30 |

Certified as a true copy and issued in lieu of a formal mandate on April 21, 1986.

Test: s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.

## APPENDIX D — RELEVANT STATUTES

**33 U.S.C. § 1288:**

**§ 1288. Areawide waste treatment management**

**(a) Identification and designation of areas having substantial water quality control problems**

**For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans—**

* * *

**(2) The Administrator shall accept any such designation, unless, within 120 days of such designation, he finds that the designated management agency (or agencies) does not have adequate authority—**

**(A) to carry out appropriate portions of an areawide waste treatment management plan developed under subsection (b) of this section;**

**(B) to manage effectively waste treatment works and related facilities serving such area in conformance with any plan required by subsection (b) of this section;**

**(C) directly or by contract, to design and construct new works, and to operate and maintain new and existing works as required by any plan developed pursuant to subsection (b) of this section;**

**(D) to accept and utilize grants, or other funds from any source, for waste treatment management purposes;**

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(E) to raise revenues, including the assessment of waste treatment charges;

(F) to incur short- and long-term indebtedness;

(G) to assure in implementation of an areawise waste treatment management plan that each participating community pays its proportionate share of treatment costs;

(H) to refuse to receive any wastes from any municipality or subdivision thereof,, which does not comply with any provisions of an approved plan under this section applicable to such area; and

(I) to accept for treatment industrial wastes.

(d) Conformity of works with area plan

After a waste treatment management agency having the authority required by subsection (c) of this section has been designated under such subsection for an area and a plan for such area has been approved under subsection (b) of this section, the Administrator shall not make any grant for construction of a publicly owned treatment works under section 1281(g)(1) of this title within such area except to such designated agency and for works in conformity with such plan.

(e) Permits not to conflict with approved plans

No permit under section 1342 of this title shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section.

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(f) Grants

(1) The Administrator shall make grants to any agency designated under subsection (a) of this section for payment of the reasonable costs of developing and operating a continuing areawide waste treatment management planning process under subsection (b) of this section.

(2) For the two-year period beginning on the date the first grant is made under paragraph (1) of this subsection to an agency, if such first grant is made before October 1, 1977, the amount of each such grant to such agency shall be 100 per centum of the costs of developing and operating a continuing areawide waste treatment management planning process under subsection (b) of this section, and thereafter the amount granted to such agency shall not exceed 75 per centum of such costs in each succeeding one-year period. In the case of any other grant made to an agency under such paragraph (1) of this subsection, the amount of such grant shall not exceed 75 per centum of the costs of developing and operating a continuing areawide waste treatment management planning proce in any year.

(3) Each applicant for a grant under this subsection shall submit to the Administrator for his approval each proposal for which a grant is applied for under this subsection. The Administrator shall act upon such proposal as soon as practicable after it has been submitted, and his approval of that proposal shall be deemed a contractual obligation of the United States for the payment of its contribution to such proposal, subject to such amounts as are provided in appropriation Acts. There is authorized to be appropriated to carry out this subsection not to exceed $50,000,000 for the fiscal year ending June 30, 1973, not to exceed $100,000,000 for the fiscal year ending June 30, 1974, and not

to exceed $150,000,000 per fiscal year for the fiscal years ending June 30, 1975, September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, and not to exceed $100,000,000 per fiscal year for the fiscal years ending September 30, 1981, and September 30, 1982.

(g) Technical assistance by Administrator

The Administrator is authorized, upon request of the Governor or the designated planning agency, and without reimbursement, to consult with, and provide technical assistance to, any agency designated under subsection (a) of this section in the development of areawide waste treatment management plans under subsection (b) of this section.

(h) Technical assistance by Secretary of the Army

(1) The Secretary of the Army, acting through the Chief of Engineers, in cooperation with the Administrator is authorized and directed, upon request of the Governor or the designated planning organization, to consult with, and provide technical assistance to, any agency designed[1] under subsection (a) of this section in developing and operating a continuing areawide waste treatment management planning process under subsection (b) of this section.

(2) There is authorized to be appropriated to the Secretary of the Army, to carry out this subsection, not to exceed $50,000,000 per fiscal year for the fiscal years ending June 30, 1973 and June 30, 1974.

(i) State best management practices program

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1. So in original. Probably should be "designated".

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(1) The Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall, upon request of the Governor of a State, and without reimbursement, provide technical assistance to such State in developing a statewide program for submission to the Administrator under subsection (b)(4)(B) of this section and in implementing such program after its approval.

(2) There is authorized to be appropriated to the Secretary of the Interior $6,000,000 to complete the National Wetlands Inventory of the United States, by December 31, 1981, and to provide information from such Inventory to States as it becomes available to assist such States in the development and operation of programs under this chapter.

(j) Agricultural cost sharing

(1) The Secretary of Agriculture, with the concurrence of the Administrator, and acting through the Soil Conservation Service and such other agencies of the Department of Agriculture as the Secretary may designate, is authorized and directed to establish and administer a program to enter into contracts, subject to such amounts as are provided in advance by appropriation acts, of not less than five years nor more than ten years with owners and operators having control of rural land for the purpose of installing and maintaining measures incorporating best management practices to control nonpoint source pollution for improved water quality in those States or areas for which the Administrator has approved a plan under subsection (b) of this section where the practices to which the contracts apply are certified by the management agency designated under subsection (c)(1) of this section to be consistent with such plans and will result in improved water quality. Such contracts may be entered

into during the period ending not later than September 31, 1988. Under such contracts the land owner or operator shall agree—

(i) to effectuate a plan approved by a soil conservation district, where one exists, under this section for his farm, ranch, or other land substantially in accordance with the schedule outlined therein unless any requirement thereof is waived or modified by the Secretary;

(ii) to forfeit all rights to further payments or grants under the contract and refund to the United States all payments and grants received thereunder, with interest, upon his violation of the contract at any stage during the time he has control of the land if the Secretary, after considering the recommendations of the soil conservation district, where one exists, and the Administrator, determines that such violation is of such a nature as to warrant termination of the contract, or to make refunds or accept such payment adjustments as the Secretary may deem appropriate if he determines that the violation by the owner or operator does not warrant termination of the contract;

(iii) upon transfer of his right and interest in the farm, ranch, or other land during the contract period to forfeit all rights to further payments or grants under the contract and refund to the United States all payments or grants received thereunder, with interest, unless the transferee of any such land agrees with the Secretary to assume all obligations of the contract;

(iv) not to adopt any practice specified by the Secretary on the advice of the Administrator in the contract

as a practice which would tend to defeat the purposes of the contract;

(v) to such additional provisions as the Secretary determines are desirable and includes in the contract to effectuate the purposes of the program or to facilitate the practical administration of the program.

(2) In return for such agreement by the landowner or operator the Secretary shall agree to provide technical assistance and share the cost of carrying out those conservation practices and measures set forth in the contract for which he determines that cost sharing is appropriate and in the public interest and which are approved for cost sharing by the agency designated to implement the plan developed under subsection (b) of this section. The portion of such cost (including labor) to be shared shall be that part which the Secretary determines is necessary and appropriate to effectuate the installation of the water quality management practices and measures under the contract, but not to exceed 50 per centum of the total cost of the measures set forth in the contract; except the Secretary may increase the matching cost share where he determines that (1) the main benefits to be derived from the measures are related to improving offsite water quality, and (2) the matching share requirement would place a burden on the landowner which would probably prevent him from participating in the program.

(3) The Secretary may terminate any contract with a landowner or operator by mutual agreement with the owner or operator if the Secretary determines that such termination would be in the public interest, and may agree to such modification of

contracts previously entered into as he may determine to be desirable to carry out the purposes of the program or facilitate the practical administration thereof or to accomplish equitable treatment with respect to other conservation, land use, or water quality programs.

(4) In providing assistance under this subsection the Secretary will give priority to those areas and sources that have the most significant effect upon water quality. Additional investigations or plans may be made, where necessary, to supplement approved water quality management plans, in order to determine priorities.

(5) The Secretary shall, where practicable, enter into agreements with soil conservation districts, State soil and water conservation agencies, or State water quality agencies to administer all or part of the program established in this subsection under regulations developed by the Secretary. Such agreements shall provide for the submission of such reports as the Secretary deems necessary, and for payment by the United States of such portion of the costs incurred in the administration of the program as the Secretary may deem appropriate.

(6) The contracts under this subsection shall be entered into only as areas where the management agency designated under subsection (c)(1) of this section assures an adequate level of participation by owners and operators having control of rural land in such areas. Within such areas the local soil conservation district, where one exists, together with the Secretary of Agriculture, will determine the priority of assistance among individual land owners and operators to assure that the most critical water quality problems are addressed.

(7) The Secretary, in consultation with the Administrator and

subject to section 1314(k) of this title, shall, not later than September 30, 1978, promulgate regulations for carrying out this subsection and for support and cooperation with other Federal and non-Federal agencies for implementation of this subsection.

(8) This program shall not be used to authorize or finance projects that would otherwise be eligible for assistance under the terms of Public Law 83-566 [16 U.S.C.A. § 1001 et seq.].

(9) There are hereby authorized to be appropriated to the Secretary of Agriculture $200,000,000 for fiscal year 1979, $400,000,000 for fiscal year 1980, $100,000,000 for fiscal year 1981, and $100,000,000 for fiscal year 1982, to carry out this subsection. The program authorized under this subsection shall be in addition to, and not in substitution of, other programs in such area authorized by this or any other public law.

(June 30, 1948, c. 758, Title II, § 208, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 839, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 4(e), 31, 32, 33(a), 34, 35, 91 Stat. 1566, 1576-1579; Oct. 21, 1980, Pub.L. 96-483, § 1(d), (e), 94 Stat. 2360).

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**33 U.S.C. § 1311 (with amendments)**

**SUBCHAPTER III—STANDARDS AND ENFORCEMENT**

**§ 1311. Effluent limitations**

**Illegality of pollutant discharges except in compliance with law**

**(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.**

**Timeable for achievement of objectives**

**(b) In order to carry out the objective of this chapter there shall be achieved-**

**(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and**

**(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by**

the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require

compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title;

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all polluants (other than those subject to subparagraphs (C)(D), or (E) of this paragraph) compliance with effluent limitations in accordance with

subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological

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(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

Waiver for certain pollutants

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to sectir 1314(a)(4) of this title, toxic pollutants subject to section .317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable.

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable

risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcionogencity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

Modification of secondary treatment requirements

(h) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

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(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under subchapter II of this chapter will be used to achieve the degree of effluent reduction required by section 1281(b)and (g)(2)(A) of this title or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the

Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title.

Municipal time extensions

(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the

requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if applicable the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1983, and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

Modification procedures

(j)(1) Any application filed under this section for a modification of the provisions of—

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(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later than 270 days after December 27, 1977;

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicty, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

Innovative technology

(k) In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) of this section by replacing existing production capacity with an innovative production process which

will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) of this section no later than July 1, 1987, if it is also determined that such innovative system has the potential for industrywide application.

Toxic pollutants

(l) The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

June 30, 1948, c. 758, Title III, § 301, as added October 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844, and amended Dec. 27, 1977, Pub.L. 95-217, §§42-47, 53(c), 91 Stat. 1582-1586, 1590.

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## SUBCHAPTER III—STANDARDS AND ENFORCEMENT

### § 1311. Effluent limitations

*[See main volume for text of (a)]*

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

*[See main volume for text of (1) and (2)(A)]*

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

*[See main volume for text of (C) to (F); (c) to (g)]*

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

*[See main volume for text of (1) to (6)]*

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit.

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(8) Repealed. Pub.L. 97-117, § 22(b), Dec. 29, 1981, 95 Stat. 1632.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection and section 1251(a)(2) of this title. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may; request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977. The

Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

*[See main volume for text of (2)(A)]*

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

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(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981;

*[See main volume for text of (B), (2); (k) and (l)]*

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extend such limitations relate to biochemical oxygen, demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter.

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1. So in original. Probably should be "than".

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(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology.

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive

disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection, and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown; *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

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**(As amended Dec. 29, 1981, Pub.L. 97-117, §§ 21, 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, Pub.L. 97-440, 96 Stat. 2289.)**

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**33 U.S.C. § 1342. National pollutant discharge elimination system**

**Permits for discharge of pollutants**

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

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(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the

case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extend as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment

standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

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(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

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(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

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Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable by the Secretary of the department in which the Coast Guard is operating, establishing specifications of safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

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Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

Irrigation return flows

(l) The Administrator shall not require a permit under this

**section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.**

**June 30, 1948, c. 758, Title IV, § 402, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 880, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 33(c), 54(c)(1), 65, 66;, 91 Stat. 1577, 1591, 1599, 1600.**

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**P.L. 95-217 § 45**

## MUNICIPAL TIME EXTENSIONS

**Sec. 45. Section 301 of the Federal Water Pollution Control Act is amended by adding at the end thereof the following new subsection:**

**"(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.**

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"(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

"(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

"(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

"(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the

Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

"(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) during the period of such time modification."

*Appendix D*

**P.L. 95-117 § 21(a)**

MUNICIPAL COMPLIANCE DEADLINE

Sec. 21. (a) Section 301(i) of the Federal Water Pollution Control Act is amended by striking out "July 1, 1983," each place it appears and inserting in lieu thereof "July 1, 1988". The amendment made by this subsection shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act beyond schedules for compliance in effect as of the date of enactment of this Act, except in cases where reductions in the amount of financial assistance under this Act or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.

(2)

No. 85-2138

Supreme Court, U.S.
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# In the Supreme Court of the United States

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TOWNSHIP OF WOODBRIDGE, PETITIONER

*v.*

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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1. On December 18, 1984, the United States District Court for the District of New Jersey entered an injunction against petitioner under the Clean Water Act (Pet. App. 23a-27a). Petitioner did not appeal from the entry of that injunction (see *id.* at 6a). Instead, five months later petitioner requested the district court to dissolve the injunction (*ibid.*). The district court refused (*id.* at 28a-29a), and petitioner then appealed pursuant to 28 U.S.C. 1292(a)(1), which permits appeals from interlocutory orders "granting * * * or refusing to dissolve or modify injunctions." The court of appeals affirmed, confining its review to whether the district court's refusal to dissolve the injunction was an abuse of discretion (Pet. App. 1a-15a).

2. Both courts below found that there were no changed circumstances, not already present when the injunction was originally entered, that warranted relief (Pet. App. 8a-9a,

31a). Both courts also found that petitioner's asserted reasons for relief were the same arguments the district court had "explicitly rejected" when the injunction was first entered (Pet. App. 6a-7a, 31a). In the district court's view, petitioner's belated repetition of these same arguments "border[ed] on the abusive" (*id.* at 31a). The court of appeals explained (*id.* at 9a):

> [Petitioner] could have presented these arguments to us on an appeal from the district court's entry of the * * * injunction. [Petitioner], however, neglected to take an appeal from that order. [*] Now that the time for appeal has run, [petitioner] may not avoid the consequences of its failure to appeal timely by cloaking its late appeal in the guise of a motion to dissolve the injunction. Absent the assertion of changed circumstances, the appellant is not entitled to the vacation of an unappealed injunction. Because [petitioner] did not assert any changed circumstances, the district court did not abuse its discretion in denying its motion to dissolve the * * * injunction.

The court correctly based this holding on the prevailing law that, absent changed circumstances, appellate review of an order denying a motion to dissolve an injunction "is confined to the propriety of the denial of the motion; it does not extend to the propriety of the entry of the underlying injunction" (Pet. App. 8a). See, *e.g.*, *Merrell-National Laboratories, Inc.* v. *Zenith Laboratories, Inc.*, 579 F.2d 786, 791 (3d Cir. 1978); *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 972 n.18 (3d Cir. 1980); *Winterland Concessions Co.* v. *Trela*, 735 F.2d 257, 260 (7th Cir. 1984); *Donaldson* v. *Pillsbury Co.*, 529 F.2d 979, 981 (8th Cir.

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*Petitioner did, however, twice attempt unsuccessfully to appeal from other interlocutory orders of the district court. See Pet. App. 6a.

1976), cert. denied, 434 U.S. 856 (1977); *Sierra On-line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n. 4 (9th Cir. 1984). On that basis, the court of appeals affirmed. In dicta, the court then stated (Pet. App. 9a) that even if it could review the correctness of the original injunction, it "nonetheless would affirm the district court." Finding that the appeal was "frivolous," the court of appeals on its own motion assessed double costs against petitioner (*id.* at 15a, 34a-35a).

3. In the circumstances of this case, there is no occasion for this Court to consider the substantive issue petitioner seeks to raise (whether a municipality's obligation to meet the requirements of the Clean Water Act is dependent upon receipt of federal financial assistance). The Third Circuit's discussion on this point is dictum. Moreover, the decision below is consistent with the decisions of the two other courts of appeals that have addressed the issue. *United States* v. *City of Detroit*, 720 F.2d 443, 451 (6th Cir. 1983); *State Water Control Board* v. *Train*, 559 F.2d 921, 924-927 (4th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

JULY 1986